

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

NELSON HERNANDEZ,
Petitioner,
v.
K. HOLLAND,
Respondent. } NO. CV 12-4701-DSF (AGR)
} OPINION AND ORDER ON
PETITION FOR WRIT OF
HABEAS CORPUS

On May 30, 2012, Petitioner filed a Petition for Writ of Habeas Corpus by a Person in State Custody (“Petition”) pursuant to 28 U.S.C. § 2254. Petitioner challenges his conviction in Los Angeles County Superior Court in 2003. (Petition at 2.)

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PROCEDURAL BACKGROUND

Pursuant to Fed. R. Evid. 201, this court takes judicial notice of the records in a prior federal habeas corpus action brought by Petitioner in the Central District of California, *Hernandez v. Hedgpeth*, Case No. CV 07-7036-DSF (AGR) (“*Hernandez I*”). (See also Petition at 1.)

On September 18, 2003, a Los Angeles County jury convicted Petitioner of first degree murder and found true various sentencing enhancements. (Petition at 2). Petitioner's sentence was 50 years to life. (*Id.*)

In *Hernandez I*, a Report and Recommendation (“R&R”) was issued on the merits on January 11, 2011. On February 7, 2011, the R&R was adopted and judgment was entered dismissing the petition with prejudice. *Hernandez I*, Dkt. Nos. 34, 40, 41.) The matter is currently on appeal. See Ninth Circuit Docket, Case No. 11-55337.

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DISCUSSION

The Petition was filed after enactment of the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”). Therefore, the Court applies the AEDPA in reviewing the Petition. *Lindh v. Murphy*, 521 U.S. 320, 336, 117 S. Ct. 2059, 138 L. Ed. 2d 481 (1997).

The AEDPA provides, in pertinent part: “Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.” 28 U.S.C. § 2244(b)(3)(A). A district court does not have jurisdiction to consider a “second or successive” petition absent authorization from the Ninth Circuit. *Burton v. Stewart*, 549 U.S. 147, 152, 127 S. Ct. 793, 166 L. Ed. 2d 628 (2007); *Cooper v. Calderon*, 274 F.3d 1270, 1274 (9th Cir. 2001) (“When the AEDPA is in play, the district court may not, in the absence of proper authorization from the court of appeals, consider a second or successive habeas application.”) (citation and quotation marks omitted).

Here, the Petition is a second or successive petition that challenges the same conviction and sentence imposed by the same judgment of the state court as in *Hernandez I*.

1 A federal court must dismiss a second or successive petition that raises the
2 same grounds as a prior petition. 28 U.S.C. § 2244(b)(1). A court must also
3 dismiss a second or successive petition raising a new ground unless the
4 petitioner can show that (1) the claim rests on a new, retroactive, constitutional
5 right or (2) the factual basis of the claim was not previously discoverable through
6 due diligence, and those new facts establish by clear and convincing evidence
7 that but for the constitutional error, no reasonable factfinder would have found the
8 applicant guilty of the underlying offense. 28 U.S.C. § 2244(b)(2)(A)-(B). It is not
9 the *district court*, however, that decides whether a second or successive petition
10 meets the requirements permitting a petitioner to file a second or successive
11 petition. Rather, “[b]efore a second or successive application permitted by this
12 section is filed in the district court, the applicant shall move in the appropriate
13 court of appeals for an order authorizing the district court to consider the
14 application.” 28 U.S.C. § 2244(b)(3)(A); see also *Felker v. Turpin*, 518 U.S. 651,
15 657, 116 S. Ct. 2333, 135 L. Ed. 2d 827 (1996). Absent authorization from the
16 Ninth Circuit, this court lacks jurisdiction over the instant Petition. *Cooper*, 274
17 F.3d at 1274.

18 Rule 4 of the Rules Governing Section 2254 Cases in the United States
19 Courts provides that “[i]f it plainly appears from the face of the petition and any
20 attached exhibits that the petitioner is not entitled to relief in the district court, the
21 judge must dismiss the petition and direct the clerk to notify the petitioner.” Here,
22 summary dismissal is warranted.

1 III.
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4 **ORDER**
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6 IT IS HEREBY ORDERED that Judgment be entered summarily dismissing
7 the Petition and action for lack of subject matter jurisdiction.
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11 DATED: _____
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14 DALE S. FISCHER
15 United States District Judge
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